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No. 84-694

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ARKANSAS POWER & LIGHT COMPANY, *et al.*,
Petitioners,

v.

UNION OF CONCERNED SCIENTISTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The Atomic Energy Act Delegates to the NRC Discretion to Establish the Emergency Planning Issues that must be Considered in a Hearing	3
II. The NRC has Determined that the Emergency Planning Exercise is not "Material" to its Licensing Board Decisions	5
III. UCS' Attempt to Explain Away the Substantial Financial Impact of the Decision Below is Unconvincing	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., —— U.S. ——, 104 S. Ct. 2778 (1984) 4

FPC v. Texaco, Inc., 377 U.S. 33 (1964) 6

Public Service Co. of New Hampshire v. NRC, 582 F.2d 77 (1st Cir. 1978) 4

Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968) 4

Sholly v. NRC, 651 F.2d 780 (D.C. Cir. 1980), *vacated and remanded*, 459 U.S. 1194 (1983) 9

Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974) 4

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) 6

Westinghouse Electric Corp. v. NRC, 598 F.2d 759 (3d Cir. 1979) 4

ADMINISTRATIVE CASES:

Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 N.R.C. 291 (1979) 7

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-75-22, 1 N.R.C. 451 (1975) 7

Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), LBP-78-30, 8 N.R.C. 327 (1978) 7

STATUTES AND REGULATIONS:

Atomic Energy Act of 1954, § 189(a)(1), 42 U.S.C. § 2239(a)(1) (1982) ..... *passim*

10 C.F.R. § 50.46 (1984) 7

10 C.F.R. § 50.47 (1984) 6

MISCELLANEOUS:

U.S. Nuclear Regulatory Commission, *Regulatory Guide 1.68: Initial Test Programs for Water-Cooled Nuclear Power Plants* (Rev. 2, 1978) 7-8

U.S. Nuclear Regulatory Commission, *Regulatory Guide 1.79: Preoperational Testing of Emergency Core Cooling Systems for Pressurized Water Reactors* (Rev. 1, 1975) 8

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REPLY BRIEF OF PETITIONERS

Arkansas Power & Light Company and eleven other electric utility companies ("petitioners"),[1] submit this reply in response to the Memorandum filed on behalf of the Federal Respondents and the Opposition Brief filed by the Union of Concerned Scientists ("UCS").

ARGUMENT

The Memorandum for the Federal Respondents submitted by the Solicitor General agrees with petitioners that the decision by the court of appeals below is incorrect and that the court of appeals has entirely failed to reconcile its holding with applicable precedent from this Court. (Gov't Memo at 3-4.) The Solicitor General also observes that the financial expense imposed on the electric utility industry "might well be substantial." (Gov't Memo at 5.) The only area where the Solicitor General

[1] In compliance with Supreme Court Rule 28.1, the parent and affiliate corporations of the petitioners were listed on page i of their petition for a writ of certiorari.

apparently does not agree with petitioners is his belief that the decision, although erroneous, is written narrowly and "therefore may have only a limited effect on the administration of the Atomic Energy Act." (Gov't Memo at 4.) But, even as to this point, the Solicitor General readily acknowledges that his "reading of the decision below may be unduly narrow." (Gov't Memo at 5.)

Given the clearly erroneous legal analysis used by the court of appeals below, the extreme financial hardship this incorrect decision is likely to place upon the electric utility industry, and the decision's potential for causing broadscale mischief to the entire regulatory scheme administered by the Nuclear Regulatory Commission ("NRC"), petitioners submit that the Solicitor General's reluctant withholding of his unqualified support to the petition for a writ of certiorari is *not* reason to deny the petition. While recognizing the limited judicial resources of the Court, petitioners nonetheless believe that, in circumstances like those raised here, public policy requires clear direction from this Court to the court of appeals that inappropriate meddling with the NRC's substantive criteria for granting nuclear power plant operating licenses is beyond the judiciary's authority and will not be countenanced.

In contrast to the Solicitor General's analysis, UCS opposes the petition because it believes the decision below to be based on "well-settled" and "well established" legal principles that are "beyond question." (UCS Br. at 2, 5.) Upon scrutiny, however, the UCS brief consists of little more than a single legal claim, which we show below be to false, and a lengthy description of a so-called "Great Licensing Delay Hoax." (USC Br. at 8-10.)[2]

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[2] UCS also argues that, while on two recent occasions Congress modified the Atomic Energy Act's hearing requirements, in both cases Congress retained the public's right to a full hearing on all "material" issues. (UCS Br. at 8-9.) Such claims are simply irrelevant. Petitioners do not seek from this Court any legislative

Stripped of its rhetorical excess, the UCS brief offers no reason why this Court should not issue a writ of certiorari to review the decision below.

I. The Atomic Energy Act Delegates to the NRC Discretion to Establish the Emergency Planning Issues that must be Considered in a Hearing

As Judge MacKinnon noted in his dissenting opinion, a primary error in the court of appeal's decision was its willingness "to intrude upon the Commission's exclusive authority to define the substantive requirements for an operating license." (Pet. App. at 31a.) The UCS brief perpetuates this error; UCS goes so far as to claim that there is *no* authority granting the NRC discretion to determine what it will require be established in a licensing hearing and what it may exclude from such a hearing. (UCS Br. at 7.)

Despite UCS's belief that Section 189(a)(1) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1) (1982), requires a hearing on the adequacy of the emergency planning exercise, it is obvious that the Act nowhere addresses the issue of emergency preparedness or specifies the inquiries and investigations that NRC must undertake in evaluating the adequacy of emergency plans. Thus, if there is any right to a hearing on emergency planning exercises, it must come from those NRC's regulations that identify the issues which need to be resolved in a hearing in order to obtain an operating license. Here, the rule struck down by the court of appeals specifically stated that, absent special circumstances, the emergency planning exercise would not be the subject of adjudicatory hearings. UCS' claim, therefore, must be

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changes to the Atomic Energy Act. What is sought is a correct judicial ruling that the NRC properly characterized emergency planning exercises as pre-operational inspections which need not be completed prior to public hearings. Whether for wholly different reasons Congress changed or did not change the Atomic Energy Act has no bearing on this case.

that the rule is an invalid exercise of the NRC's authority to specify the relevant issues which must be resolved in an operating license hearing. This claim is plainly aimed directly at the NRC's special expertise and not at mere procedural questions.[3]

Under the Atomic Energy Act, the NRC's regulatory authority is to be guided by Congress' general concern that the NRC protect "the common defense and security" and the "health and safety of the public." In addressing these concerns the NRC enjoys an "unfettered mandate to issue 'such rules and regulations as may be necessary to carry out the purposes of [the Atomic Energy Act.]' " *Westinghouse Electric Corp v. NRC*, 598 F.2d 759, 771 (3d Cir. 1979); *see also Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978); *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1076-77 (D.C. Cir. 1974); *Siegel v. AEC*, 400 F.2d 778, 783, (D.C. Cir. 1968).[4] UCS' string citation to the *Gen-*

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[3] It is for this reason that UCS' attempt (UCS Br. at 7 n.4) to explain away the Court's recent decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, 104 S. Ct. 2778 (1984), must fail.

[4] UCS cites the *Siegel* case as support for its claim that the public has a right under Section 189(a)(1) of the Atomic Energy Act to a hearing on all "material" issues. (UCS Br. at 6.) So far as that claim goes, UCS is correct. However, *Siegel* explicitly confirms that the NRC "is virtually unique in the degree to which broad responsibility is reposed in the administering agency" to determine for itself what are the "material" issues. *See* 400 F.2d at 783. In this case, the NRC, exercising the authority recognized in *Siegel*, has determined that the emergency planning exercise is not "material" to the predictive findings its licensing boards must make. Indeed, in the sentences just before and just after that relied upon by UCS, the *Siegel* court makes precisely the same argument being advanced by petitioners. Faced with a claim that the hearing required by Section 189(a) was not held, the court dismisses the argument as "surely a renewal of the substantive argument in a procedural guise." The court goes on to hold that the NRC has the authority to "restrict a hearing." *See* 400 F.2d at 784.

eral Motors, Public Service Co. of New Hampshire and *Independent Bankers Association* cases (UCS Br. at 6), is inapposite. Those cases all confirm a party's right to a hearing when the statute so provides. None of those cases addresses the separate issue of an agency's inherent authority to determine for itself the substantive requirement of which issues must be resolved in a hearing prior to license issuance. Thus, the cases cited by UCS are of no help to its position, since they all *assume* that the matter at issue must by statute or rule be included in the hearing. Here, by contrast, the issue is whether the Atomic Energy Act requires a hearing on the emergency planning exercise, and not how that hearing is to be conducted.

II. The NRC has Determined that the Emergency Planning Exercise is not "Material" to its Licensing Board Decisions

The entire UCS argument in support of the decision below rests on a rather straightforward two-part syllogism (UCS Br. at 6.) UCS first maintains that a pre-operational test of the emergency plan is "material" to the NRC's licensing decision since the NRC will not issue an operating license unless such an exercise is completed successfully. The second prong of UCS's argument is that Section 189(a)(1) of the Atomic Energy Act requires the NRC to hold an adjudicatory hearing on all issues "material" to its licensing decisions.

The crux of the issue is whether the NRC necessarily must hold a hearing on all matters that it considers before issuing an operating license. That it need not is evidenced by a long history, unchallenged either by Congress or the courts, of requiring utilities to pass successfully a broad range of pre-operational tests while not holding hearing on such tests. Significantly, at no place in its opposition brief does UCS ever claim that, because the NRC requires successful completion of pre-operational tests as a condition to license issuance, the NRC

must hold hearings on such tests. Put simply, the treatment urged by UCS for emergency planning exercises is wholly at odds with the NRC's consistent practice of not holding hearings on other pre-operational tests.

Where both UCS and the court of appeals below erred is in failing to distinguish the differing ways that certain matters are "material" to the NRC's licensing decisions. With respect to the adequacy of emergency preparedness, the NRC by rule has established that sixteen planning standards must be satisfied (including the planning standard for emergency planning exercises), *see* 10 C.F.R. § 50.47(b)(1)-(16) (1984), but that the results of the emergency planning exercise need *not* be considered in any hearing. 10 C.F.R. § 50.47(a)(2) (1984). Thus, by *substantive* rule the NRC has determined that the sixteen emergency planning standards are "material" to a licensing board decision but that the outcome of the emergency planning exercise is *not* "material" to such a hearing.[5]

The results of the emergency planning exercise still remain "material" to the overall licensing decision because the NRC has said that, notwithstanding a successful showing of compliance with the sixteen planning standards, it will require successful completion of the emergency planning exercise before issuing an operating license. However, the NRC has also said that successful completion of the emergency planning exercise does not bear on the *predictive* finding its licensing boards must

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[5] UCS would have the Court ignore the holdings in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), and in *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964), because UCS views the NRC's generic substantive determination in this case to be the requirement to conduct emergency planning exercises. (UCS Br. at 11-12.) This view of the case simply ignores what the NRC did—which was to hold that the emergency planning exercises would be required as part of pre-operational testing, but were *not* to be included as part of the hearing process. UCS is not free to recharacterize NRC action in a way which distorts the agency's intent.

make—that is, it is not "material" to such a finding (Pet. App. at 74a)—and can more appropriately be evaluated if performed as part of pre-operational testing when people and equipment are more likely to be in place and ready. (Pet. App. at 93a-96a.)

This regulatory approach is identical to that followed by the NRC in other areas of its responsibility. Consider, for example, how the NRC determines the adequacy of a reactor's emergency core cooling system ("ECCS").[6] The NRC's regulations require an ECCS which shall be designed so that its calculated performance satisfies specified criteria. 10 C.F.R. § 50.46(a)(1) (1984). These criteria specify acceptable peak temperatures, oxidation quantities, hydrogen generation, cooling geometry, and assurance of long-term cooling capacity. 10 C.F.R. § 50.46(b)(1)-(5) (1984). Whether calculated performance meets these standards can be litigated in an operating licensing hearing. Significantly, the NRC's rules do not authorize an intervening party to request a test of the ECCS or to demand a hearing on the results of such a test.[7] This is so notwithstanding the NRC's requirements for extensive pre-operational testing to confirm the actual, in-place functioning of the ECCS. *See, e.g.*, U.S. Nuclear Regulatory Commission, *Regulatory Guide 1.68: Initial Test Programs for Water-Cooled*

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[6] The emergency core cooling system is to provide an alternative source of cooling water in the event an accident disables the reactor's primary cooling source. As such, it is a very significant part of the reactor's engineered safety features designed to avoid and mitigate adverse effects from so-called loss-of-coolant accidents.

[7] Indeed, NRC has specifically rejected attempts to require ECCS testing, and consideration of test results in hearings, as a prerequisite to license issuance. *See, e.g., Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 N.R.C. 291, 324 (1979); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), LBP-78-30, 8 N.R.C. 327, 333 (1978); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-75-22, 1 N.R.C. 451, 455 (1975).

Nuclear Power Plants at pp. 1.68-9 to 1.68-10 and 1.68-17 (Rev. 2, 1978); U.S. Nuclear Regulatory Commission, *Regulatory Guide 1.79: Preoperational Testing of Emergency Core Cooling Systems For Pressurized Water Reactors* (Rev. 1, 1975).

III. UCS' Attempt to Explain Away the Substantial Financial Impact of the Decision Below is Unconvincing

In our petition for a writ of certiorari, we estimated the likely financial impact resulting from the delay in license issuance that would be caused by the decision below. (Pet. at 19-21.) Three different groups of nuclear power plants were considered: those that had full-power operating licenses issued since the effective date of the rule invalidated by the court of appeals, those likely to get new low-power or full-power operating licenses within the next year, and all other operating license applications. Depending on the assumptions used, the financial penalty to the utilities and their consumers varied from at least several hundred million dollars to more than $7 billion.

UCS maintains this analysis "paint[s] a grossly distorted picture." (UCS Br. at 16.) Yet UCS does not even mention, let alone contest, the estimated impacts of $280 million to $1.7 billion to the 14 plants receiving full-power operating licenses since the effective date of the rule invalidated by the decision below. (Pet. at 20.) Similarly unpersuasive is UCS's attempt to argue from its calculated licensing histories. (UCS Br. at 16-17.) First, the period between full-power license issuance and commercial operation, calculated by UCS to be 9.9 months, is totally irrelevant. The commercial operation date is designated by the utility for commercial and rate-making purposes and has nothing to do with NRC licensing or with attaining full-power operation. UCS's discussion of the time to commercial operation only serves to obfuscate the true financial impacts from the decision below.

Second, regardless of whether one uses UCS' calculations of 6.4 months or 4.5 months for the period between low-power and full-power license issuance,[8] hearings and decision on the emergency planning exercise easily will exceed the available time.[9] In this regard, we would note that the expedited procedures referred to by the court of appeals (Pet. App. at 23a-24a) and UCS (UCS Br. at 17), already are part of normal NRC practice and are not likely to further shorten the hearing schedule.

In summary, UCS offers no reasons for believing that the adverse financial impacts described by petitioners will

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[8] The longer time interval is due to the unique, 26-month period for one of the 12 reactors considered by UCS (UCS Br. at 16 and n.13) and can therefore be discounted.

[9] Pet. at 19. *See also Sholly v. NRC*, 651 F.2d 780, 793 (D.C. Cir. 1980), *vacated and remanded*, 459 U.S. 1194 (1983) (Statement on Denial of Rehearing En Banc) (9 months for hearings on license amendments). Consider the following rather optimistic schedule:

Event	Cumulative Time (days)
(a) Emergency planning exercise	0
(b) Report on exercise by FEMA	30
(c) Submission of, briefing, and decision on, contentions for hearing	75
(d) Submission of, and response to, discovery requests (interrogatories, documents requests, depositions)	135
(e) Submission of testimony	150
(f) Hearing	155
(g) File post-hearing briefs	185
(h) Licensing Board decision	210

That schedule shows a minimum of 7 months from the date of exercise to licensing board decision. Significantly, the hearing portion is only five days. Moreover, in NRC proceedings contention formulation, discovery and decision routinely take longer than set forth above. The schedule includes no time for resolution of discovery disputes, the filing of or ruling on summary disposition motions, or any other type of motions practice that is typical before the NRC. The schedule also allows no time for internal NRC appeals or judicial intervention.

not occur. Notwithstanding UCS's hyperbole, licensing delays do occur and cost utilities and their customers dearly.[10] All past experience with NRC hearing procedure confirms that delay is both likely and inevitable.

CONCLUSION

For all the reasons stated above and in their petition, the electric utilities submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[10] For example, the Shoreham plant which UCS states was completed in May 1984 (UCS Br. at 9 n.7) is not yet operating because of NRC licensing delays.